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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 680

ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, SOLICITORS FOR COMPLAINANT IN CHANCERY, PETITIONERS,

vs.

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

No. 681

J. S. S. WEISMAN AND JOHN MILTON, RECEIVERS IN CHANCERY OF CROSBY STORES, INC., PETITIONERS,

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ISAAC GROSS AND JOEL GROSS, PARTNERS AS GROSS & GROSS, AND WILLIAM HARRIS, SOLICITORS FOR RECEIVERS IN CHANCERY, PETITIONERS,

vs.

IRVING TRUST COMPANY, TRUSTEE CROSBY STORES, INC., BANKRUPT

BRIEF FOR PETITIONERS.

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Of Counsel with Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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(Italics, etc., mine except where otherwise noted)

BRIEF FOR PETITIONERS.

I.

The Opinions Below.

The memorandum of the United States District Court is printed (p. 43) not reported, filed Dec. 6, 1932.

The opinion of the United States Circuit Court of Appeals is printed page 63 and is reported in 61 Fed. (2d) 812.

Both opinions relied upon the prior opinions of the same District Court in *Silberberg* v. *Ray Chain Stores, Inc.*, 54 Fed. (2d) 650, and the same Circuit Court of Appeals, 58 Fed. (2d) 766, certiorari denied, 53 Sup. Ct. 83, 77 L. Ed. 35 (U. S. Supreme Court Adv. Opinions No. 1, Oct. 1932 Term, p. 35).

These cases are here on three writs of certiorari granted March 13, 1933 (U. S. Supreme Court Advance Opinions, No. 10, p. 658, 77 L. Ed. 658, 53 Sup. Ct. 507) to review an order of the United States District Court for the District of New Jersey, filed August 31st, 1932 (p. 44), modified by an order of September 15th, 1932 (p. 46), affirmed on appeal by the United States Circuit Court of Appeals, for the Third Circuit, by three orders entered November 17, 1932 (pp. 67, 68). Three separate appeals were taken from the order of the District Court of August 31st, 1932 (p. 44)—one by petitioners, J. S. S. Weisman and John Milton individually and as receivers of Crosby Stores, Inc., from that portion of the order directing them individually and as receivers to turn over to the trustee in bankruptcy of Crosby Stores, the sum of $6,000 which had been paid to them as receivers jointly as compensation under an order of the Court of Chancery of New Jersey (p. 48); another by petitioners Isaac Gross and Joel Gross, partners, as Gross & Gross from that portion of the order directing them to turn over to the trustee in bankruptcy the sum of $350 paid to them by order of the Court of Chancery of New Jersey as compensation as solicitors of the complainant in a receivership proceeding pending in that court (p. 48); the third by petitioners Isaac Gross and Joel Gross, partners, as Gross & Gross, and William Harris from that portion of the order directing

them to pay to the trustee in bankruptcy the sum of $4,000 besides taxed costs paid to them by order of the Court of Chancery of New Jersey as compensation for their services as solicitors for the receivers of Crosby Stores, Inc. in the Court of Chancery of New Jersey (p. 47).

II.

Jurisdiction.

The jurisdiction of this Court is rested on sec. 240 of the Judicial Code, as amended by the act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, Title 28, U. S. C. A. 359. The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is November 17, 1932.

III.

The grounds upon which the jurisdiction of this Court is invoked.

The grounds upon which the jurisdiction of this Court is invoked are, as stated in paragraph 5 of the petition for the writs, summarized:

(a) The Circuit Court of Appeals decided an important question arising under the Bankruptcy Act in such a manner as that irreconcilable conflict has been created between the United States District Court in Bankruptcy and the Court of Chancery of New Jersey, which can only lead to unseemly disputes and cross-proceedings in contempt

against receivers appointed by the State court and trustees acting under the authority of the court of bankruptcy.

(b) As a result of the decision by the Circuit Court of Appeals, it will be impossible, for practical purposes, for receivers appointed by State courts to do anything more with the property of a corporation in receivership than to hold it for a period of four months after the appointments, for the effect of the decision is that an adjudication in bankruptcy, no matter how long after the filing of the petition, if the petition be filed within four months after the appointment of a receiver, is to undo and render void every act performed by the receiver after the filing of the petition.

(c) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Jack Stolkin, Inc.*, 42 Fed. (2d) 829 (C. C. A., 2nd, 1930). The Circuit Court of Appeals for the Third Circuit and the District Court, as well as the Circuit Court of Appeals for the Ninth Circuit in *Moore* vs. *Scott*, 55 Fed. (2nd) 863, misapprehended the effect of the decisions of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645; *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, and *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151, and failed to give due weight to the decisions of this Court in *In re Watts*, 190 U. S. 1, 47 L. Ed. 933; *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, which latter line of cases the New Jersey Court of Chancery has followed.

IV.

Statement of the Case.

On September 3, 1931, a bill was filed in the Court of Chancery of New Jersey against Crosby Stores, Inc., a New Jersey corporation, praying for an injunction against defendant corporation and the appointment of receivers pursuant to the Corporation Act of New Jersey, section 65, 2 C. S. of N. J., p. 1640, as amended P. L. 1931, chapter 221, p. 545, sec. 66, 2 C. S. of N. J., p. 1643; on October 13, 1931, the court granted the statutory injunction and appointed petitioners J. S. S. Weisman and John Milton as receivers, as a result of which title to all of the corporation's property passed by virtue of the statute to the receivers, sec. 68, 2 C. S. of N. J., p. 1644, *Nottebaum* v. *Leckie,* 31 Fed. (2d) 556 (C. C. A. 3rd); on October 14, 1931, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against Crosby Stores, Inc., and the Irving Trust Company was appointed receiver in bankruptcy; no ancillary proceedings were instituted in New Jersey; Crosby Stores, Inc., was adjudged a bankrupt by the United States District Court for the Southern District of New York on October 30, 1931; on December 1, 1931, Irving Trust Company was made trustee in bankruptcy; immediately upon the appointment of the receivers in Chancery they entered into possession of the corporation's property and, under orders of the Court of Chancery, continued the business, which was that of operating department stores (Schedule "G," annexed to the trustee's petition, p. 29); in the conduct of the business the receivers purchased and sold mer-

chandise, incurring obligations, paying in part therefor, and, at the time of the appointment of the trustee in bankruptcy, they had in hand $15,628, to the credit of the Jersey City store and $3,161.77 to the credit of the Perth Amboy store and were indebted to receivers' creditors for merchandise purchased in the operation of the Jersey City store in the sum of $8,832.83 and for consigned merchandise sold at such store $2,382.12 and for operating expenses $683.62, and for merchandise purchased by them in the operation of the Perth Amboy store in the sum of $3,092.58 and for consigned merchandise sold at such store $594.40, and for operating expenses $512.85 (Schedule "H," annexed to the trustee's petition, p. 36; Schedule "G," annexed to the trustee's petition, p. 29).

It is impossible to allocate the moneys in the hands of the receivers, at the time they ceased to operate the business on December 17, 1931, between proceeds of the liquidation of inventory of which they took possession at the time they were appointed and proceeds of the sale of merchandise purchased by them during the time the business was conducted by them. From the date of the appointment of Irving Trust Company as receiver in bankruptcy on October 14, 1931 until December 11, 1931, the receiver and the trustee in bankruptcy acquiesced in the conduct of the business by the receivers in Chancery. On December 11, 1931 the trustee in bankruptcy presented its petition to the referee in bankruptcy in New York which resulted in an order to show cause made by the referee on the same date which, in turn, resulted in the making of the order of December 14, 1931, by the Referee, the receivers in Chancery not appearing on the return of the order to show cause, directing the receivers in Chancery to turn over to the Irving Trust Company all of the property under their con-

trol as receivers in Chancery and to file their account with the Referee (Schedule "B," annexed to the petition, p. 12). This order of the referee in bankruptcy was designed to make effective a sale which the trustee in bankruptcy had made on December 1, 1931, of all of the assets of the bankrupt (pars. 5, 6, 7, petition of trustee, p. 2).

On December 9, 1931 the receivers in Chancery filed their report and account with the Court of Chancery (Schedule "G," annexed to the petition of the trustee, p. 29) which resulted in an order made on that day directed to all the creditors and stockholders and the trustee in bankruptcy requiring them to show cause why the account and report of the receivers should not be approved and proper compensation made (Schedule "C," annexed to the petition of the trustee, p. 14); the trustee, instead of appearing in the Court of Chancery, met the application by the order of the Referee of December 14, 1931 (Schedule "B," annexed to the petition of the trustee, p. 12); on December 14, 1931 the Court of Chancery, disregarding the order of the Referee, made an order approving the receivers' accounts and directing the payment to the receivers of $6,000 for services, to the solicitors of the receivers $4,000 for services besides costs, and to the solicitors of the complainant $350 besides costs (Schedule "D," annexed to the petition of the trustee, p. 16); the trustee in bankruptcy did not appear upon the hearing in the Court of Chancery; instead it instituted its first proceeding af an ancillary nature in the United States District Court for the District of New Jersey by filing a petition, on December 16, 1931 (Schedule "F-1," annexed to the petition of the trustee, p. 21), which resulted in the order of the United States District Court of the same date directed to the receivers and their

solicitors and the solicitors of the complainant in Chancery to show cause before the United States District Court why they should not be directed to turn the assets over to the trustee in bankruptcy and to file their accounts with, and make application for allowances to, the Referee in New York; the receivers in Chancery disregarded this order and, on December 22, 1931, the United States District Court (Schedule "F," p. 26) made an order directing the receivers in Chancery to turn over to the trustee all of the assets under their control "excepting such moneys as they shall have necessarily expended in and about the preservation of the assets and property of said bankrupt prior to the date of the filing of the involuntary petition in bankruptcy against said bankrupt" (one day) and also restraining them from "in any manner disposing of any and all moneys heretofore received by them and/or any of them pursuant to an order made by said Court of Chancery bearing date the 14th day of December, 1931, wherein they were awarded compensation for services alleged to have been rendered by them or any of them referred to in said order"; the receivers in Chancery, after liquidating all their indebtedness, turned over the balance in their hands to the trustee in bankruptcy but refused to turn over the moneys which they had received for compensation under the orders of the Court of Chancery; they filed a further account with the Court of Chancery (Schedule "H," annexed to the petition of the trustee, p. 36), which resulted in an opinion of Vice Chancellor Fallon, 109 N. J. Eq. 450, and in the filing of the petition of the trustee on July 1, 1932 (p. 1), which resulted in the order appealed from (p. 44).

V.

Specifications of Error.

1. The United States Circuit Court of Appeals erred in holding that it had jurisdiction in bankruptcy in a summary proceeding to direct the receivers in Chancery, counsel for the receivers and counsel for the complainant, to turn over to the trustee of the bankrupt estate amounts representing fees and costs which had been allowed to them for compensation for services rendered and monies expended in the proceedings in the Court of Chancery which had resulted in the appointment of receivers under the statute of New Jersey and the partial administration of the estate under the directions of the Court of Chancery.

2. The United States Circuit Court of Appeals erred in not holding that the Court of Chancery, which had originally acquired jurisdiction, was competent to hear and determine all questions with respect to the administration of the estate while in the control of the Court of Chancery, through its receivers, and to wind up their accounts, to fix their fees and the fees of their counsel and the solicitor of the complainant and erred in holding that the mere filing of the petition in bankruptcy superseded all jurisdiction of the Court of Chancery.

Argument.

1. The decision below is in conflict with the established State law and the decisions of this court and lower Federal courts.

2. The decision below unduly interferes with the right of the State court to wind up the affairs of estates which have come to its possession so that its receivers and their counsel may be compensated and what remains turned over to a trustee in bankruptcy.

3. The decision below destroys the independence of the State courts in violation of State rights.

4. The decision below was erroneous in that it held that the District Court might proceed summarily against the receivers, receivers' counsel and the solicitors of the complainant in the State Court, they being adverse claimants.

The District Court concluded, and its conclusion was sustained by the Circuit Court of Appeals, that, as soon as the adjudication in bankruptcy, title to the bankrupt's estate vested in the trustee as of the date of the filing of the petition and the jurisdiction of the Court of Chancery of New Jersey was superseded as of the date of filing the petition and that court had no power to wind up the affairs of the estate which had come to it at a time when it had complete jurisdiction, compensate its receivers and their counsel and the solicitor of the complainant and direct the receivers to turn over what might remain to the trustee in bankruptcy. The Circuit Court of Appeals further held that the District Court had power to proceed against the receivers, receivers' counsel and solicitors for the complainant, in a sum-

mary proceeding in bankruptcy notwithstanding that they were adverse claimants of the funds in their possession which had been paid to them by order of the State court and that the officers of the State court had what were in the nature of liens upon the assets of the trust estate in their charge. *Seidler* v. *Branford Restaurant,* 97 N. J. Eq. 153, affd. 97 N. J. Eq. 531; *Jeffers* v. *N. J. and P. R. Co.,* 86 N. J. Eq. 68; *Chesapeake & Ohio R. R. Co.* v. *Atlantic Transportation Co.,* 62 N. J. Eq. 751; *Petersburg Sav. & Ins. Co.* v. *Dellatorre,* 70 Fed. 643 (C. C. A. 5th).

While it is true that an adjudication in bankruptcy places the bankrupt's assets in *custodia legis,* for certain purposes, as of the date of the filing of the petition, it does not follow that the prior actual possession and jurisdiction of a State court is superseded for all purposes. The orderly conduct of administration between successive jurisdictions requires at least that the court having prior jurisdiction be permitted to wind up the proceedings before it, to compensate its officers, and to discharge their obligations.

A contrary view will result in chaos. A receiver appointed by a State court may, under direction of the court, carry on the corporate business, sell property, personal and real, incur obligations upon receiver's certificates and incur other debts. A petition in bankruptcy may be filed shortly before the lapse of the four-month period (and this "four months" period may be changed—Congress might make it a year or any other length of time) and adjudication may follow some time later. Under the decision of the lower courts, it is entirely clear, I submit, that every act of the receiver, after the filing of the petition, is utterly void and this despite the fact that the receiver may be unaware of the filing of the petition. And since it is

unlikely that any court will authorize its receiver to issue certificates, incur debts, or proceed with the administration of the receivership estate if the court has not the power to ultimately provide for the payment of the receiver's certificates and debts and to compensate the receiver and his counsel, the practical effect of the lower courts' decision is to prevent equity or statutory receiverships in State Courts.

The Chancery Receivers upon their appointment gave bond conditioned that they would account in Chancery. How under the circumstances can they comply with the condition of their bond?

The opinion of the District Court in *Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2nd) 650, affirmed 58 Fed. (2nd) 766, certiorari denied, 77 L. Ed. 35, U. S. Supreme Court Advance Opinions, No. 1, October, 1932 Term, p. 35, 53 Sup. Ct. 83, upon which the decision below rests, intimates that acts performed by a State court receiver within four months prior to the filing of a petition in bankruptcy (and the four months might be extended by Congress to any length of time) are at least reviewable by the bankruptcy court, because the appointment of a receiver itself is an act of bankruptcy and void as against the trustee. The adoption of such a view would immediately result in the elimination of all equity or state statutory receiverships.

To preserve their receivership jurisdiction and insure the orderly administration between successive courts, the State courts have reached a conclusion contrary to that reached by the courts below. *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 344, 50 Atl. 387 (1901); *Shannon* v. *Shepard Mfg. Co.*, 42 A. B. R. 12, 230 Mass. 224, 119 N. E. 768 (1918); *Perfection Garment Co.* v. *Crosby Stores, Inc.*, 109

N. J. Eq. 450 (Ch. 1932); *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. Eq. 105 (Ch. 1930); *Colton* v. *Bankshares Corporation of the United States*, 108 N. J. Eq. 417 (Ch. 1931); *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109-111 (Ch. 1913); *Cudahy Packing Co.* v. *New Jersey Dairy Products Co.*, 90 N. J. Eq. 541 (Ch. 1919); *Board of Directors of Suburban Construction Co.* (1913), 143 N. Y. Supp. 363 (not officially reported); *Isenberg* vs. *Kimberley Phonograph Co.*, 111 N. J. Eq. 195 (Ch. 1932); Contra: *Bloch* v. *Bloch*, 86 N. Y. Supp. 1047 (not officially reported). Recognizing the existence of the rule is *Taylor* v. *Mason* (Va. Sup. Ct. of Appeals), 164 S. E. 652, 158 Va. 870.

In *Colton* v. *Bankshares Corporation*, 108 N. J. Eq. 417 (1931), Vice Chancellor Backes ably expressed the position of the State court:

> "On May 2d, 1930, Samuel I. Kessler was appointed receiver of the defendant company. On June 6th, on its own petition the company was adjudged a bankrupt by the federal court in New York and on August 14th the Irving Trust Company was appointed trustee. The receiver has filed his account, asks its approval, the fixing of his compensation and that of his counsel and direction to pay the residue to the trustee. On June 15th, 1931, the federal court (a referee) ordered the receiver individually to file his account in that court together with a verified statement of his services and expenses as receiver to the date of the adjudication and that he forthwith turn over the estate in his hands to the trustee. New York counsel of the trustee, who was also the attorney of the petitioner in bankruptcy, appeared on this motion, *pro hac vice*, and, presuming to appear specially objected to the court making allowances, claiming that the jurisdiction resides in the federal court.

A compliance with the order of the federal court by our receiver without the consent of this court would be contempt of this court. A more orderly and courteous procedure would have been to have applied to this court for directions to its receiver; and, according to the authorities, that is the exclusive course. The course adopted by counsel for the trustee is unwarranted and his statement in court that a non-compliance with the order of the referee might result in our receiver landing in jail is offensive. The federal court may well be depended upon to restrain such threatened abuse of power. The practice as laid down in Shachat *v.* Standard Auto Supply Co., 106 N. J. Eq. 105, is that indicated *In re* Watts & Sachs, 190 U. S. 1, which has ever since been the guide of courts and lawyers in this state, that the court of primary jurisdiction may supervise the administration of its receivers and fix their compensation, and it will be adhered to. The recent case of Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734, cited by the trustee, does not touch that question. That was a foreclosure of mortgage suit brought after a trustee was appointed and the court held it to be not maintainable; that as the mortgaged property was in the hands of the bankruptcy court, the right to a lien and its enforcement could only be handled in that court. The opinion deals with the title to bankrupt's property and not with the orderly judicial administration of bankrupt's assets, and restates the familiar rule that obtains in all courts of equity and upholds the authority of this court as the court of original jurisdiction to dispose of property in its custody according to law: "* * * when a court of competent jurisdiction takes possession of property through its officers this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction may not disturb

that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property.' This is a plain recognition of the power of this court to control the disposition of property in *custodia legis* and that right must be accorded by the bankruptcy court until this court has set its house in order. The principles of comity in judicial conduct are informatively discussed by Mr. Justice Moody in Wabash Railroad Co. *v.* Adelbert College, 208 U. S. 38. The duty of this court under our corporation act was to administer the estate while in its possession and its duty now is to pass the assets over to the federal court, whose jurisdiction has superseded ours under the Bankruptcy Act, after liquidating the expenses attending its administration in this court. This makes for convenient and orderly conduct of administration between successive jurisdictions, and is supported by the weight of authority and has been followed by both state and federal courts as the appropriate course since *In re* Watts & Sachs."

In *Kennedy* v. *American Tanning Co.*, 81 N. J. Eq. 109 (1913), Vice Chancellor Garrison said (p. 111):

"Without going deeply into the matter, I cannot conceive it possible that the bankruptcy court would contend that it was entitled to take over the property which had been in *custodia legis* in this court until this court should have reimbursed those who had, under its direction or with its sanction expended moneys for the preservation of the property in question. Very different questions arise where moneys are to be paid out for any other purposes, and I shall not herein discuss those other questions."

This Court and lower Federal courts have, on many occasions, recognized the propriety of the view of the State courts in decisions which are in conflict with the decision of the courts below in the case at bar. In *In re Watts*, 190 U. S. 1, 35, 47 L. Ed. 933, 944 (1903), Chief Justice Fuller, speaking for this Court, said:

> "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

In *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 491 (C. C. A., 5th, 1902), certiorari denied 186 U. S. 483, 46 L. Ed. 1261, citing approvingly *Mauran* v. *Crown Carpet Lining Co.*, 23 R. I. 324, 50 Atl. 331, and in *Brown* v. *Crawford*, 254 Fed. 146 (District Court of Oregon, 1918) and in *Ohio Motor Car Co.* v. *Eiseman Magneto Co.* (C. C. A., 6th, 1916), 230 Fed. 370, at 376, it was held that the bankruptcy court ought not to make a peremptory order on a State receiver directing him to turn over assets to the receiver or trustee in bankruptcy and that application should be made, in the first instance, by the receiver or trustee in bankruptcy to the State court and Justice Sanford, six months later Justice of this Court, when District Judge for the Eastern District of Tennessee, in *Re Dayton Coal & Iron Co.*, 291 Fed. 390 (1922), so carefully considered the cases which had been decided up to that time and so anticipated the confusion and unseemly conflict which would arise upon the promulgation of such a rule as the Courts below in the case

at bar have adopted as that I quote from the opinion somewhat *in extenso* (p. 399):

> "In the light of the foregoing cases, I conclude that the prior jurisdiction acquired by a State court in a winding up proceeding, is not *ipso facto* superseded or suspended by the filing of a petition in bankruptcy, but that, as the State court cannot take judicial notice of the bankruptcy proceeding and is under the duty of proceeding in the case before it until informed of the changed relations of the defendant, it retains its jurisdiction in the winding up proceedings, under the rule of comity, until the pendency of the bankruptcy proceedings is brought to its notice and a request made to it by the bankruptcy court or a duly authorized officer thereof, for the delivery of possession of the property of the defendant. A contrary holding would, in my opinion, be not only in conflict with the foregoing authorities and the rule of comity, but against a sound public policy. It would certainly lead to most disastrous results, to the wasting of the assets in fruitless litigation, and to great confusion, if, after the filing of the petition in bankruptcy the hand of the State court is to be deemed as stayed by the mere operation of law, so that when, without notice of the bankruptcy petition or any request of the bankruptcy court for the surrender of the assets, the State court proceeds in the due administration of the estate entrusted to its charge, adjudicating the rights of parties, selling and disposing of assets, and subsequently after an interval of months, or in case of contest and appeals, perhaps of years, an adjudication in bankruptcy is made, its jurisdiction is to be deemed to have been terminated as matter of law, upon the filing of the petition and all its subsequent proceedings rendered thereby void. And this is

> especially the case where the bankruptcy court has not only failed to request the delivery of the property, but, on the contrary, as in this case, affirmatively declined to appoint a receiver to take charge thereof. So far as I am aware, this has never been held or even suggested in any previous case. And I find nothing contrary to the view herein expressed in the holding in *Re* Diamond's Estate (6th Cir.), 259 Fed. 70, 170 C. C. A. 138. There the receiver of the bankruptcy court had been directed to apply to the State court for the surrender of all the debtor's assets, and the State court had, upon such application, directed its receiver so to do. Thereafter an adjudication in bankruptcy having been made, and the State receiver declining to turn over all the assets to the bankruptcy receiver, as he had been ordered by the State Court to do, it was held that the bankruptcy court might summarily compel him to surrender such assets. There, of course, the State court had received actual notice of the pendency of the bankruptcy proceedings, the rule of comity had been fully complied with, and the recalcitrant receiver was then no longer holding the assets for the State court, but in disobedience of its specific order. See Galbraith *v.* Vallely, 256 U. S. 46, 41 Sup. Ct. 415, 65 L. Ed. 823."

The learned Judge distinguishes *In re Diamond's Estate,* 259 Fed. 70, decided in 1919, with respect to which the Circuit Court of Appeals for the 2d Circuit in *In re Jack Stolkin, Inc.,* 42 Fed. (2d) 829, in 1930 said that it had been decided before the decision of this Court in *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823.

There is no doubt, if the opinions in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2d) 650, affirmed 58 Fed. (2d) 766, followed in the case at bar, state the law, but that any act

performed by a State or Federal Court of equity in receivership proceedings after the filing of a petition in bankruptcy, and whether the State or Federal Court of equity had knowledge of the filing or no, is void. This means that, immediately upon the filing of a petition in bankruptcy, even if the State or Federal Court of equity has no knowledge of it, the State or Federal Court of equity loses jurisdiction, the filing of a petition being a caveat against the world. If the State or Federal Court of equity has knowledge of the filing of the petition, no matter what the emergency, it must immediately cease its administration—and what is its receiver to do? If it has no knowledge of the filing of the petition and it and its receiver proceed with the administration of the estate, being without jurisdiction, its acts, and the acts of its receiver, are void and those who deal with it or its receiver, however *bona fide*, acquire no rights whatever. The property of a corporation might be in the hands of a receiver appointed by a State or Federal Court of equity in New Jersey. The corporation might have a business place in San Francisco. A petition in bankruptcy might be there filed. No notice of it might be acquired by the Court in New Jersey for months and yet every act of the Court in New Jersey and of its receiver, after the filing of the petition, would be void. Its receiver, for acts performed by him under its directions, would be obliged to cross the continent to have his conduct passed upon and allowances made to him for any services which the Court of Bankruptcy in San Francisco might deem were worthy of compensation, assuming now, which is questionable, that, under the bankruptcy act, the Court of Bankruptcy has any power to make any such allowance. Creditors of the receiver, becoming such upon the faith of the

orders of the Court in New Jersey, including purchasers of receiver's certificates, would be obliged, if they desired to protect such rights as they might have as a result of void acts—for receiver's certificates may have been authorized by the Court in New Jersey after the filing of the petition in bankruptcy without knowledge thereof—to travel to the place in which the Court of Bankruptcy would be sitting and depend upon that Court for such protection as it might be able, under the law, to afford.

There is no express provision of the Bankruptcy Act permitting a Court of Bankruptcy to compensate State receivers or to provide for the protection of creditors of State or Federal equity or statutory receivers and the absence of such express provisions is, I submit, an indication that Congress never intended that such a situation as would be created, if the opinions below state the law, should ever arise. The effects which may be created by an act of Congress, if certain interpretations are put upon its language, and the effects which may be created by holding that Congress, under the Constitution, has certain powers may be taken into consideration in construing an act or in construing a constitutional grant of power. *First National Bank* v. *Maine,* 284 U. S. 312, 76 L. Ed. 313.

This Court has been consistent in expressing its desire that conflict between State and Federal courts be avoided, and in *Harkin* v. *Brundage,* 276 U. S. 36, 72 L. Ed. 457, it said (at p. 465):

> "In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity. * * *"

It is true that the matter involved in that case was one over which the Federal and State Courts had concurrent jurisdiction, but in *Re Watts,* 190 U. S. 1, 47 L. Ed. 933, decided in 1903, Mr. Chief Justice Fuller, delivering the opinion of this Court, while stating that the laws of the United States with respect to bankruptcy were paramount, nevertheless indicated that, under them, the possession by a State court, through its receivers, of property which had lawfully come under the control of the State Court could not be summarily taken from it by the Federal Court.

It was argued below by respondent that Watts did not interpret the language of this Court as giving him the right to apply to the State Court to have his fees fixed because he applied to the Federal Court as indicated in *In re M. Zier & Co.,* 127 Fed. 399, affirmed 142 Fed. 102. Respondent overlooked that, prior to the decision of this Court, the assets of the estate had been delivered to the bankruptcy receiver,—indeed, prior to the case coming to this Court (47 L. Ed. 938, 190 U. S. 16).

The State Court, having parted with possession of the assets would not, of course, entertain jurisdiction to settle fees which it could not order paid. There was nothing for Watts to do except to apply to the Federal Court.

It was argued below that the remarks of Mr. Chief Justice Fuller upon which I rely were obiter. If obiter, they were judicial obiter and were made with deliberation and intent by Mr. Chief Justice Fuller for all of the Justices of this Court, save Mr. Justice Harlan, and with full knowledge that they might, by some, be considered obiter, for the concurring remarks of Mr. Justice Harlan were of such a nature as to indicate to the other members of the Court that he thought that they might have decided the case upon narrower reasoning.

It was suggested below that the language of Mr. Chief Justice Fuller to the effect that it remained "for the State Court to transfer the assets, settle the accounts of its receiver and close its connection with the matter" does not imply that he meant that the State Court might compensate its officers. If the language does not include the right of the State Court to compensate its officers, neither does it include the right of the State Court to make provision, out of the assets, for the payment of the debts of the receiver incurred upon the faith of the State Court's orders. How can a Court settle the accounts of its receiver and close its connection with the matter without compensating its officers and without providing for the payment of debts incurred under its authority?

The settlement of accounts includes all of these matters for the accounts of the receiver cannot be settled, nor can the State Court's connection with the matter be closed, without considering them. Debts which may be created under the orders of the State Court are not, technically, debts of the State Court—but, nevertheless, they are debts incurred under the authority of the State Court, and in conscience, are the debts of the State Court, and, if the rule establishel by the opinions below be given effect, the State Court in effect becomes a suppliant at the bar of the Federal Court before the referee in bankruptcy. Did Congress intend this?

The Watts case has been relied upon by the State Courts and by many of the lower Federal courts, and unless it establishes the rule in a case where there is a State proceeding, which is superseded by a bankruptcy proceeding, there is no authoritative decision of this Court, although there are decisions in analagous cases which, I submit, support the position of petitioners here.

Lion Bonding Co. v. *Karatz,* 262 U. S. 640, 67 L. Ed. 1151, at page 1152, was relied upon by respondent below. The opinion in that case was delivered upon a motion to modify a decree entered as a result of the opinion in *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871. A reference to the facts stated in that opinion will indicate that the case was not concerned in any manner with bankruptcy, with the result that the statement in the opinion relied upon below was obiter.

Stellwagen v. *Clum,* 245 U. S. 605, 62 L. Ed. 507, decided in 1918, opinion by Mr. Justice Day, was relied upon by respondent below. What this Court was considering in that case was whether the State statute there under consideration was suspended by the existence of the Federal bankruptcy act under the doctrine of *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529; *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606. Mr. Justice Day cited the Watts case, 190 U. S. 1, 47 L. Ed. 933, 943, as one of the authorities for the proposition that "the bankruptcy proceedings, taken within four months, displace those in the State court and terminate the jurisdiction of the latter." What was meant by this remark of Mr. Justice Day depends upon what meaning is to be ascribed to the words "terminate the jurisdiction." If the Watts case is examined it becomes apparent, I submit, that the language only means that, with respect to the subsequent administration of the estate for the benefit of creditors, the Federal Court steps in. It cannot mean that the State Court immediately loses all jurisdiction, for the opinion in the Watts case expressly indicates that the State Court retains jurisdiction to transfer the assets, settle the accounts of the receiver and close its connection with the matter, and this Court declined to concur in the argument of

the bankruptcy receiver to the effect that the State Court, having no jurisdiction whatever after the filing of the petition in bankruptcy, had no power to hear and determine the question of whether or not it would relinquish the property and that it became its duty to do so at once, upon being informed of the proceedings in the United States Court, and that every step taken thereafter with reference to the property and its custody was *coram non judice.*

I will next consider decisions of this Court involving the rights of assignees for the benefit of creditors which are stated to be analogous to the rights of receivers. I submit that the rights of a receiver appointed under the New Jersey statute concerning corporations are higher than the rights of an assignee under a general assignment but, however that may be, if an assignee, acting under a State statute, has the right to hold adversely to a receiver or trustee in bankruptcy the property in his possession as security for the payment of his fees and expenses, then, *a fortiori,* a receiver appointed under the New Jersey statute has the same right. So far as I know, no statute of any other State provides that, upon the appointment of a receiver, not only the right to possession but title vests in the receiver.

The three cases in this Court with respect to the rights of assignees under general assignments are: *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413 (1902); *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823 (1921); *May* v. *Henderson,* 268 U. S. 108, 69 L. Ed. 870 (1925).

In connection therewith there is to be considered *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, decided by the Circuit Court of Appeals for the Second Circuit (1930).

Louisville Trust Co. v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, were disposed of below by respondent by the assertion that, in each case, the assignee had been paid the moneys involved for his fees prior to the filing of the petition in bankruptcy, and *In re Jack Stolkin, Inc.*, 42 Fed. (2nd) 829, in the same manner.

In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, Comingor had been acting as an assignee under a State statute. He had filed his accounts in the State Court. He had been enjoined by the Bankruptcy Court from proceeding with his accounting. The Bankruptcy Court entertained a summary proceeding against him to compel him to turn over the amounts of moneys which he had paid counsel and which he had himself retained. It is obvious that he could not have retained money prior to the proceedings in bankruptcy, for he was still acting as assignee up to that time. There could be no retention until the proceeding in bankruptcy had been commenced. This Court, in the course of its opinion, 184 U. S. 18, 46 L. Ed. 413, a page 416, said:

> " 'We think that it could not have been the intention of Congress thus to deprive parties claiming property of which they were in possession of the usual processes of the law in defense of their rights.' Marshall *v.* Knox, 16 Wall. 556, 21 L. Ed. 484; Smith *v.* Mason, 14 Wall. 419, 20 L. Ed. 748."

It then said (p. 416):

> "He, (the assignee) had been restrained from settling his accounts in the state court in the action pending there, and the district court, instead of dissolving the injunction declining jurisdiction, and leaving the litigation to the state court, either in due

course or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the circuit court of appeals was right in its decree of reversal."

Galbraith v. *Vallely*, 256 U. S. 45, 65 L. Ed. 823, is found below in *In re Reiswig*, 253 Fed. 390. The Court below attempted to distinguish the Comingor case. It recognized that there was no difference in the application of the law as to whether the payments had been made before or after the proceeding in bankruptcy had been commenced, and in the course of its opinion said, (p. 398):

> "Such being the real decision in the Comingor case, it is not an authority for the doctrine that a court of bankruptcy has no jurisdiction to cite a common-law assignee to account for moneys which have come into his hands under the assignment, but is only an authority against the abuse of the jurisdiction. The assignee, as to all moneys which come into his hands under the assignment, is the agent of the bankrupt (not so as to a receiver appointed under the New Jersey Corporation Act), and the fact that he claims a certain part of the fund for fees and expenses, does not make him any more an adverse claimant as to those sums than the same claim would be for the residue of the estate. The assignee cannot by his mere say-so cause himself to cease to hold a part of the estate as the agent of the bankrupt, and convert himself into an adverse claimant. If, while acting in good faith as assignee, he had actually disbursed the moneys which he claims as fees and expenses, he cannot be committed to jail for failure to turn them over." * * * (Page 390): "On February 4, 1918, respondent, Galbraith,

> filed with the referee in bankruptcy his report and account as assignee, which showed receipts as above, and set forth a detailed statement of disbursements, amounting to $1,631.53. * * * The residue, to wit, $1,631.53 Galbraith retained as legitimate disbursements and fees under the common law assignment." * * * (399): The assignee here, when cited to show cause, had not parted with the funds in any real sense."

It attempted to distinguish the Comingor case by holding that all that this Court had held was that, if it appeared, upon the hearing on an order to show cause, that the assignee did not have funds in his possession at that time to respond to a summary order, he could not be summarily proceeded against by an order which would have the effect of placing him in jail.

The District Court was affirmed by the Circuit Court of Appeals for the 8th Circuit, in *Galbraith* v. *Vallely*, 261 Fed. 670, and the opinion of that Court is important for the reason that it indicates the views of the lower Courts which were before this Court and with which this Court could not agree. It is significant that the Circuit Court of Appeals relied upon *Randolph* v. *Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; *Stellwagen* v. *Clum*, 245 U. S. 605, 62 L. Ed. 507, both of which were relied upon by respondent below.

When the case came to this Court, 256 U. S. 46, 65 L. Ed. 823, this Court did not question the facts as stated by the lower courts and I submit that it appears that, at least with respect to the money retained, this Court treated it, as had the courts below, as having been in the possession of the assignee after the proceeding in bankruptcy had been commenced and segregated thereafter, else the word "re-

tained" would not have been used. This Court said (256 U. S. 46, 65 L. Ed., at p. 824):

> "We think the referee was right in holding that the case was governed by Louisville Trust Co. *v.* Comingor, *supra.* * * *
>
> It may be, as suggested by the circuit court of appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. The principle of the Comingor case has never been departed from in this court. It establishes the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith, before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for contempt is the means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest, duly made, against that method of procedure."

It is true that this Court said (p. 824):

> "Without waiving objection, and subject to the right of Galbraith to assert his objection to the pro-

> ceedings, testimony was taken concerning the money expended and retained by the assignee prior to the bankruptcy proceedings, for administering the estate."

But I submit that a consideration of the opinions of the lower Courts will indicate that this Court did not mean that the money had been retained by the assignee prior to the bankruptcy proceedings, but rather that it represented compensation for services rendered prior to the bankruptcy proceedings.

The opinion of this Court construes its former opinion in *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and distinguishes and limits its decision in *Randolph* v. *Scruggs,* 190 U. S. 533, 47 L. Ed. 1165, upon the latter of which great reliance was placed by respondent below.

These cases were all considered by the Circuit Court of Appeals for the 2nd Circuit in 1930 in *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829. In that case there can be no question but that items involved represented payments made after the filing of the petition in bankruptcy.

In construing the law as determined by this Court in cases later than *Bryan* v. *Bernheimer,* 181 U. S., at page 192, 45 L. Ed. 814, relied upon by respondent below, the Circuit Court of Appeals said (42 Fed. (2d) 830):

> "But the Supreme Court, while adhering to the rule that the bankruptcy court may summarily order the assignee to turn over property in his hands or under his control which formerly belonged to the bankrupt in so far as it is not fairly required to pay obligations which he incurred before the petition was filed, or to compensate him for his services, has

> treated him as an adverse claimant in respect to such items."

After considering *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely*, 256 U. S. 46, 65 L. Ed. 823, the Circuit Court of Appeals for the 2nd Circuit, said (42 Fed. (2nd) 831):

> "Thus it seems to have been steadily held that the claims of an assignee for compensation or indemnity for expenses in matters antedating the filing of a petition in bankruptcy so far as they are not colorable cannot be disposed of in a summary proceeding. The amount which may be allowed depends upon the benefit which has been afforded to the bankruptcy estate (Randolph *v.* Scruggs, 190 U. S. at p. 538, 23 S. Ct. 710, 47 L. Ed. 1165) but it must be determined in a plenary action if the assignee stands on his rights in this respect."

It considered the effect of *May* v. *Henderson*, 268 U. S. 111, 69 L. Ed. 870, relied upon by respondent below, in the following language (42 Fed. (2nd) 831):

> "In May *v.* Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, the Supreme Court held that assignees were properly directed to turn over assets of a bankrupt estate to the trustee in a summary proceeding. But Justice Stone, who wrote the opinion, at page 119 of 268 U. S., 45 S. Ct. 456, 460, distinctly recognized Louisville Trust Co. *v.* Comingor and Galbraith *v.* Vallely as binding authorities and only rejected the assignee's contention that he was an adverse claimant because the claim there was 'merely colorable and on its face made in bad faith and without any legal justification'."

It declined to follow *In re Neuberger,* 233 Fed. 701, affirmed 240 Fed. 947 and *In re Diamond's Estate,* 259 Fed. 70, upon the ground that they had been decided before *Galbraith* v. *Vallely,* and that each, like *In re Reiswig,* reversed in the Galbraith case, sought to distinguish *Louisville Trust Co.* v. *Comingor* upon a basis subsequently rejected by this Court in the Galbraith case.

The fact is that what the Circuit Court of Appeals said in *In re Diamond's Estate,* 259 Fed. 70, upon the subject of the power of the Federal court in bankruptcy to require State receivers to turn over all of the assets without permitting the State court to make provision for the compensation of the receivers was obiter for, prior to the decision, the State court had yielded and had directed its receiver to pay the money to the bankruptcy receiver (259 Fed. 72) as was pointed out by Judge Sanborn in *In re Dayton Coal & Iron Co.,* 291 Fed. 390 (p. 17 of this brief).

In re Zier & Co., Circuit Court of Appeals for the 7th Circuit, 142 Fed. 102, which was the outgrowth of the Watts case, is not authority because, prior to the decision of this Court in the Watts case, the State court had yielded and the assets had been turned over to the trustee in bankruptcy.

Hume v. *Myers,* 242 Fed. 827, Circuit Court of Appeals for the 4th Circuit, (1917), relied upon by the Circuit Court of Appeals for the 6th Circuit in *In re Diamond's Estate,* 259 Fed. 70, is not in point. In that case there had been an equity receivership in the Federal court. Subsequently, there were bankruptcy proceedings. The receivers in equity "turned over the entire property to the trustee in bankruptcy and thereafter filed their petition in the court of bankruptcy alleging the order of the district court for the eastern district (an order which purported to allow re-

ceivers' and counsel fees, but without charging the property directed to be turned over with their payment) to be an adjudication of their claims binding on the bankruptcy court, conferring on them a right to have the allowances to them and their counsel paid in preference to the lien creditors". The question before the Circuit Court of Appeals was stated by that Court, 242 Fed. at page 829, in the following language:

> "Stripped of mere incidental facts, the case made by the appeal is this: A court of equity appoints receivers of a corporation on the ground of insolvency, at the instance of a stockholder owning nearly all the stock, in a proceeding to which no creditor, secured or unsecured, was made a party by service. While the property is undisposed of in the hands of the receivers, the corporation is adjudicated a bankrupt. The court of equity then orders its receivers to turn over the corporate property to the trustee in bankruptcy, and by the same order fixes the compensation of the receivers and their counsel, without making provision for its payment. Is the order of the court of equity, making the allowances, binding as res adjudicata on the court of bankruptcy?"

There was not presented the matter of a refusal of State court receivers to turn over property to the bankruptcy court until their compensation had been paid or provided for. The Court used language which indicated that it considered that there is a distinction between cases in which the assets have been turned over and cases in which they have not been, for it said (242 Fed. 830):

> "There is a distinction between the effect of the order before us and an order of a court of equity making such allowance, where the property has,

through the instrumentality of the receivers, been disposed of, and the purchase money is in the hands of the receivers. In the latter situation there is reason in the view, though we do not commit ourselves to it, that the court of equity turns over only the net fund in its hands after deducting the expenses incurred in its production, including the compensation of its receivers and their counsel. It is true that in many of the cases broad language is used in favor of the authority of courts to fix the compensation of their officers; but these cases related to allowances and payment from funds in hand, not to fixing charges upon specific property to be turned over to the bankruptcy court. Kennedy v. American Tanning Co., 81 N. J. Eq. 109, 85 Atl. 812; Singer v. National Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868; State v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570; In re Board of Directors Suburban Co., 143 N. Y. Supp. 363; Mauran v. Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Id., 23 R. I. 324, 50 Atl. 331; Wilson v. Parr, 115 Ga. 629, 42 S. E. 5. The distinction is forcibly stated in Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028. When the court of equity has not reduced the property to money, it is not in possession of that definite knowledge of the value of the property which is an important factor in finally fixing compensation."

What the Court held was that, after the property had been turned over to the trustee in bankruptcy, any order made by the court of equity could not be considered as *res adjudicata* in the court of bankruptcy, but that the court "by comity will indulge the presumption in favor of the correctness of the allowance."

It referred to the Watts case, 190 U. S. 1, 47 L. Ed. 933, and it considered that the language of this Court to the

effect that it remained "for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter errors, if any, committed in so doing could be rectified in due course and in the designated way," meant "rectification by the bankruptcy court, for, after the assets are turned over to that court, all orders relating to the matter must emanate from that court." Mr. Chief Justice Fuller, I submit, in the Watts case did not mean that, if the State court retained jurisdiction to settle the accounts of its receivers, the bankruptcy court, by direct action upon the State court, could cure any errors. The "designated way" referred to was, I submit, by appeal to the appropriate State appellate court, with ultimate resort to this Court. It is clearly, I submit, indicated by both *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823, that, where the bankruptcy court cannot entertain summary jurisdiction, the proper court of appeal is the State appellate court, for no other procedure would be orderly.

I now consider *Isaacs* v. *Hobbs Tie & Timber Company,* 282 U. S. 734, 75 L. Ed. 645, and *Straton* v. *New,* 283 U. S. 318, 75 L. Ed. 1060, the first decided Feb. 24, 1931, and the latter April 20, 1931, as a result of which the Courts below in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2nd) 650, followed in the case at bar, conceived themselves bound to overturn the established practice, so far at least as the District of New Jersey is concerned. Neither case involved the situation now before this Court or a situation analogous thereto. The cases heretofore mentioned were not cited. The principle established by *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely,* 256 U. S. 46, 65 L. Ed. 823, was not considered.

In *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, Mr. Justice Roberts, speaking for this Court, refers to *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, with approval. The observations of Mr. Chief Justice Fuller in the Watts case with respect to the paramountcy of the bankruptcy law had been relied upon below as authority for the statement that the Bankruptcy Court would not permit the prosecution of proceedings to enforce a lien in a State Court where the proceedings had been commenced more than four months before the bankruptcy. Mr. Justice Roberts, in 75 L. Ed. at page 1101, adverting to the language of Mr. Chief Justice Fuller, said:

> "The language quoted from that case by appellees respecting the paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts on which it was predicated."

And so, whatever language was used by this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, and *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, with respect to the "paramount and exclusive jurisdiction of the court of bankruptcy must be read in connection with the facts upon which it was predicated."

Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed. 645, involved but one question, as stated by Mr. Justice Roberts, speaking for this Court, 75 L. Ed., at p. 655, 282 U. S. 735, as follows:

> "After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land

> (part of such estate) entirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

Obviously the answer had to be "no" and, in making the answer, this Court had no occasion to consider the matter which is now here. The difficulty is occasioned by the language as follows, 75 L. Ed., at p. 661, 282 U. S. 737:

> "Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; T. E. Wells & Co. v. Sharp, 125 C. C. A. 609, 208 Fed. 393; Galbraith v. Robson-Hilliard Grocery Co., 133 C. C. A. 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate."

and page 664:

> "When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154; Dayton v. Stanard, 241 U. S. 588, 60 L. Ed. 1190; 36 S. Ct. 695."

This Court then adds (p. 665):

> "This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. Murphy v. John Hofman Co., 211 U. S. 562; 53 L. Ed. 327, 29 S. Ct. 154, supra; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. Ed. 379, 28 S. Ct. 182; Harkin v. Brundage, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268. Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. Ex Parte City Bank, 3 How. 292, 11 L. Ed. 451; Houston v. City Bank, 6 How. 486, 12 L. Ed. 526; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; Re Wilka (D. C.), 131 Fed. 1004, supra; Nisbet v. Federal Title & T. Co., 144 C. C. A. 54, 229 Fed. 644. The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end."

It may be conceded that, upon adjudication, title to the bankrupt's property for certain purposes vests in the trustee as of the date of the filing of the petition, although that remark of this Court in the Isaacs case was *obiter* for it appears that the proceedings in foreclosure in the State court had been commenced after adjudication, and the

bankrupt act, Sec. 70, by its express terms, Title 11, U. S. C. A., Sec. 110, p. 277, provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt. * * *"

Mueller v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, is authority only for the proposition that title and the right to possession vests in the trustee as of the date of adjudication. The question there was whether the mere fact that a third party held property of the bankrupt, asserting no interest in himself, prevented a court of bankruptcy taking summary action to compel a turnover to the trustee. Obviously the answer should be "no" for, the title and right of possession having vested in the trustee as of the date of adjudication, there could be no question but that the trustee could summarily take from a third party, who held such propertly solely in trust for the bankrupt and so for the trustee, the trustee having succeeded to the right of the bankrupt, and the determination in that case is no authority for a holding that the title and right of possession of the trustee related back to the date of the filing of the petition for all purposes.

Mueller v. *Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, must be read in connection with what this Court later said in *Louisville Trust Co.* v. *Comingor* and *Galbraith* v. *Vallely*, and also in connection with *In re Watts*, 190 U. S. 1, 47 L. Ed. 933, for Mr. Chief Justice Fuller delivered the opinion in the Watts case as also in the Mueller case.

Robertson v. *Howard,* 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, is not, as I read the case, authority for the proposition that title vests in the trustee "as of the date of the filing of the petition in bankruptcy." It is authority that a trustee takes title to property both within and without the district and that was the only point involved.

Neither *Wells & Co.* v. *Sharp* (C. C. A. 8th), 208 Fed. 393, nor *Galbraith* v. *Robson-Hilliard Grocery Co.,* 216 Fed. 842 (C. C. A. 8th), I submit, is authority for the broad statement that title vests as of the date of the filing of the petition.

Applying the language of this Court to the facts in the Isaacs case it seems to me that it must be considered that what was meant by the statement that the title and right of possession to all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy was that the trustee might take such proceedings in a court of bankruptcy as might be necessary to make effective his right to the title and possession as of the date of the adjudication, at which date, the statute says, the title and right of possession shall vest in the trustee, to property in the possession of a third party who asserts no adverse interest recognized by the bankrupt law. This Court did not mean, I submit, to announce a principle under which, under all conditions and circumstances, every act performed by anyone with respect to the bankrupt's property, after the filing of the petition but before adjudication and without notice of the bankruptcy proceedings, is void. Had this Court meant this it would have been obliged, I submit, to have overruled *Louisville Trust Co.* v. *Comingor,* for the effect of that decision was that, after proceedings in bankruptcy have been instituted,

the State court may settle accounts of an assignee and make orders which will affect the bankrupt's property for this Court in that case in the concluding portion of its opinion said (46 L. Ed., at p. 416, 184 U. S. 26):

> "He (the assignee) had been restrained from settling his accounts in the state court in the action pending there, and the district court, instead of dissolving the injunction declining jurisdiction, and leaving the litigation to the state court, either in due course or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the circuit court of appeals was right in its decree of reversal."

The opinion in the Comingor case follows the opinion in the Mueller case and both were delivered by Mr. Chief Justice Fuller.

The language of this Court in the Isaacs case, 282 U. S. 734, 75 L. Ed. 645, to the effect that the possession of the bankruptcy court "would not be affected by actions brought in other courts" applies to proceedings brought in other courts, after the property has been brought into the possession of the bankruptcy court, of a similar nature to that with which this Court was there dealing,—a foreclosure brought after adjudication. It has no reference to a case such as is here involved where, at the time of the filing of the petition in bankruptcy, the property was *in custodia legis* in the actual possession of a court having jurisdiction nor to such incidental effect as may be created upon the assets by permitting that Court to close its connection with the transaction in an appropriate manner. That this Court

intended to confine its remarks to such actions as it was dealing with is indicated by what it says is the reason underlying the rule which it announced, for it says (page 665):

> "This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; * * *."

This Court was there speaking of actual as distinguished from constructive possession of a court.

In *Straton* v. *New*, 283 U. S. 318, 75 L. Ed. 1060, the attempt was to enjoin a proceeding in a State Court which had for its purpose the enforcement of a lien of a judgment-creditor, the lien having been acquired and the proceeding in the State Court having been commenced more than four months before bankruptcy. This Court held that such a suit could not be stayed by the Bankruptcy Court and its decision is indicated by the eleventh headnote. The tenth, eleventh and twelfth headnotes have reference to the only matters which were before this Court. What this Court said upon the subject of the power of the bankruptcy court with respect to proceedings instituted within four months of the filing of the petition in bankruptcy is, I submit, obiter.

This Court in the Straton case indicated that any language from any case "must be read in connection with the facts on which it was predicated," and the only question before this Court in that case was, as stated in the opinion, 75 L. Ed., at p. 1084, 283 U. S. 320, as follows:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a state court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the state court of jurisdiction, or vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

The answer of this Court was "no".

In the course of the opinion Mr. Justice Roberts said, 283 U. S., at p. 321, 75 L. Ed., at p. 1087,

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as a *custodia legis* from the filing of the petition."

It is upon this language and upon the language of *Isaacs* vs. *Hobbs Tie & Timber Co.* to the effect that, upon adjudication, "title to the bankrupt's property vests in the trustee, with actual or constructive possession, and is placed in the bankruptcy court. * * * The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy * * *", that the Courts in *Silberberg* vs. *Ray Chain Stores*, based their conclusions, 54 Fed. 2nd, 650, affirmed 58 Fed. 2d 766, followed in the case at bar.

Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, is cited in *Straton* v. *New* as authority

to the effect that the estate is regarded as *in custodia legis* from the filing of the petition.

In that case this Court, speaking by Mr. Justice Day, used precisely the same language, so far as applicable here, as was used by Mr. Justice Roberts in *Straton* v. *New*. But in that case it was held that, notwithstanding all that was said, where an attachment suit had been brought after a petition in bankruptcy had been filed, a State court might proceed with it, the bankruptcy court not having moved in the bankruptcy case for upwards of five years. This Court said (222 U. S. 300, 56 L. Ed. 214):

> "The case presented therefore shows that the bankruptcy court, upon the filing of the petition in bankruptcy, found an outstanding creditors' agreement under which it was proposed to administer and distribute the estate. It declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts outside of the court, and not contemplated in the bankruptcy act. The creditors in large numbers signified a purpose to take stock in a reorganization and for more than five years after the time of the filing of the petition, it was found by the supreme court of Missouri, had made no attempt to adjudicate the corporation a bankrupt, or proceed to the settlement of the estate under the requirements of the act."

This Court further said:

> "It is suggested that even now the bankruptcy court may proceed to an adjudication, but this suggestion is at war with all that has been done with the knowledge and sanction of the district court. As we

> have seen, the property to be administered in the bankruptcy court is that which belonged to the bankrupt at the filing of the petition, and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed, and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law. Many of the creditors have signified their purpose to adjust their claims by taking stock in a reorganization, or 50 cents on the dollar, of the amount of their claims. The whole proceeding makes it clear that the district court denied the adjudication and declined to exercise its jurisdiction as a bankruptcy court."

It is clear from this opinion that, in no true sense, does the State Court lose jurisdiction merely because of the filing of a petition in bankruptcy. If it wholly lost jurisdiction, then it would be wholly immaterial whether the Bankruptcy Court proceeded in the bankruptcy matter for the mere pendency of the petition would deprive the State Court of any right. So long at least as the proceedings were pending in the Bankruptcy Court, the State Court could not proceed. At least the petition in bankruptcy must be dismissed before any act of the State Court could have any validity.

But the petition in bankruptcy in the *Acme Harvester Co.* case, 22 U. S. 300, 56 L. Ed. 208, was still pending at the time the State Court proceeded. It had not been dismissed and it was urged that the Bankruptcy Court might still proceed with the bankruptcy petition, to which contention this Court answered (p. 214):

> "As we have seen, the property to be administered in the bankruptcy court is that which belonged

> to the bankrupt at the filing of the petition and then subject to his debts. This property can never be recovered. With the sanction of the district court much of it has been sold, its character has been changed and it has been dealt with by the creditors' committee regardless of the provisions of the bankruptcy law."

But, if the theory of the opinions of the Courts below is correct, all of this changing could have no effect for the acts of the State Court, which had created the changes, were void.

This Court, in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed., at page 672, also said:

> "Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

citing

> *United States Fidelity & G. Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055,

and that expression of this Court was relied upon below by respondent.

If, in all instances, a court of bankruptcy "is powerless to surrender its control of the administration of the estate" then how can the decision of this Court in *Acme Harvester* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, be justified? That decision rests upon the facts that the bankruptcy court "declined to appoint a receiver; it recognized the propriety of the proceedings of the creditors' committee; it received reports of the creditors' committee, and allowed it for years to go on in the operation of the property, to mature a plan for the settlement of the debts out-

side of the court, and not contemplated in the bankruptcy act." Was not this a clear surrender of the Court's control of the administration of the estate?

United States Fidelity and G. Co. v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, was a case in which, by leave of the bankrupt court, a proceeding had been instituted against the trustee in a court of equity, which proceeding obviously sought to have determined matters with respect to the administration of the estate and its distribution, which matters were by the bankruptcy act confided exclusively to the bankruptcy court. A creditor protested. It was in the light of these facts that this Court used the expression (225 U. S. 218, 56 L. Ed. 1062):

> "Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

The Acme Harvester Co. case was decided December 18, 1911, and the U. S. Fidelity & G. case in May, 1912, and there is nothing in the latter case which indicates that this Court intended to modify in any manner that which it had said in the former case.

The cases heretofore mentioned in this Court are impossible to reconcile, I submit, if the broad language of the opinions is to be considered without regard to the facts before this Court. When this Court uses the terms "paramount," "exclusive," "jurisdiction," "*custodia legis*," "*caveat* against the world," and the like, the facts must be considered to determine in what sense the respective terms were used.

And we must, I submit, always bear in mind that all of the law which we are discussing is judge made. There are no directions of the bankruptcy act providing for the situations which have been dealt with in the cases mentioned. "Judge-made," it may be "judge-altered" to meet existing conditions. The language of the Courts may be interpreted in such a way as to prevent the effect which would be created by giving full force and effect to the opinions below and to the opinions in *Silberberg* vs. *Ray Chain Stores*, 54 Fed. (2nd) 650, aff. 58 Fed. (2nd) 766, if that effect is not in accord with sound public policy for it is not to be conceived that Congress, unless it has spoken by express words, has intended to create a result which would not be in accord with a sound public policy. *First National Bank* v. *Maine*, 284 U. S. 312, 76 L. Ed. 313 (1932).

It is not difficult to ascertain what rule is deductible from these cases which will not have the effect of creating the result effected by the decision below. All that we are obliged to do is to confine the language of the respective cases to the facts before the courts at the times of the decisions.

True it is that, under some circumstances, a trustee in bankruptcy may assert rights as if his title and right of possession to the bankrupt's property related back from the date of adjudication to the date of the filing of the petition, and that, for certain purposes, the property of the bankrupt is to be considered as *in custodia legis* in the bankruptcy court as of the date of the filing of the petition, and true it is that, under certain conditions, a bankruptcy court may not surrender its jurisdiction. But we have found that it is likewise true that, under certain conditions, notwithstanding the pendency of a petition in bankruptcy,

a State court may proceed in an attachment suit instituted after the filing of the petition, *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 56 L. Ed. 208, and that a bankruptcy court may surrender its jurisdiction, and that an assignee, who is acting under a State statute, may, after the filing of a petition in bankruptcy and adjudication, be permitted to apply to the State court to pass upon his compensation, *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. Ed. 413 (last paragraph of the opinion).

I submit that the true rule to be deduced from the cases, applicable to a situation such as here presented, is that stated by Mr. Chief Justice Fuller in the Watts case, 190 U. S. 1, 47 L. Ed. 933, which has never been criticized by this Court. A decent regard for the integrity of the two systems of courts requires that this rule be scrupulously followed, and there is nothing in any opinion of this Court which prevents it from being followed if the language of the opinions be confined to the facts then before the Court.

Mr. Justice Sanford, when District Judge for the Eastern District of Tennessee, in the case of *In re Dayton Coal & Iron Co.*, 291 Fed. 390, as I have previously stated (p. 16), anticipated just what has occurred as a result of the application of the rule established by the Courts below, and pointed out that such a result would be against public policy and indicated how it could be avoided.

Parenthetically, it is apparent that this Court in *Straton* v. *New*, 283 U. S. 318, 75 L. Ed., at p. 1098, in stating that State insolvency laws which are tantamount to bankruptcy proceedings "are suspended while the latter remains in force, and proceedings under them are utterly null and void * * *," was referring to statutes which are bankruptcy acts providing for the discharge of debts. It is so well settled as

not to be the subject of debate that the New Jersey Corporation Act, so far as its insolvency features are concerned, is not suspended by the Bankruptcy Act. The statute provides for equitable *quo warranto*. *Gallagher* vs. *Asphalt Co.*, 67 N. J. Eq. 441.

If there is to be a well ordered administration of the law, with due regard to the bankruptcy act and the power of the Federal courts under it and of the power and authority of the State and Federal courts of equity, it must, I submit, be held that, notwithstanding the fact that, for some purposes, the property of the bankrupt is considered as *in custodia legis* in the bankruptcy court as of the date of the filing of the petition, if there follows an adjudication, it does not follow that, where property is already *in custodia legis* in a State or Federal court of equity at the time of the filing of the petition, the constructive "*custodia legis*" of the bankruptcy court forthwith supersedes the actual "*custodia legis*" of the State or Federal court of equity and it must be held that, before the power of the State or Federal court of equity ceases, there must be something more than a mere constructive "*custodia legis*" in the bankruptcy court established by the mere filing of the petition in bankruptcy. There must be actual intervention by the bankruptcy court asserted through the officers of that Court.

This Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 75 L. Ed., at page 665, stated that, when the jurisdiction of the bankruptcy court attached, the Court's possession could not be affected by actions brought in other courts and added that this was but an application "of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers" this "withdraws the property from the jurisdiction of all

other courts which, though of concurrent jurisdiction, may not disturb that possession."

The only question is as to when, where property is already *in custodia legis* in a State or Federal court of equity at the time of the filing of the petition in bankruptcy, does the succession take place. If the succession takes place as of the date of the filing of the petition in bankruptcy, no matter how long the adjudication may be delayed, no matter how long the bankruptcy court may refrain from interference by the appointment of a receiver or whatnot, all of the acts of the State or Federal court of equity are void and there is nothing for the State or Federal court of Equity to do under the circumstances except to shut down with no place to turn the property. But, if the succession take place upon the actual exercise or assertion of jurisdiction by the United States Bankruptcy Court, all difficulty passes away. If it be conceded that it is then that the succession takes place there is no difficulty in holding that, upon the assertion of an intent of the bankruptcy court to take into its possession the property of the alleged bankrupt through its receiver, or trustee, the State or Federal court of equity should be permitted to close its connection with the affair, and in the closing of that connection, that it must settle the accounts of its receivers, provide for their compensation and provide for the liquidation of indebtedness incurred upon the faith of its orders.

The District Court in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. (2d) 650, treats the opinion of Mr. Justice Holmes in *Randolph* v. *Scruggs,* 190 U. S. 533, 47 L. Ed. 1165, as determining that a general assignment for the benefit of creditors, made within four months of bankruptcy, is void in the sense that, not only does the deed itself fall, but any act

performed by the assignee in dealing with the property is of no force or effect. It is clear, I submit, that Mr. Justice Holmes in the Scruggs case did not mean to so hold. If we read his entire opinion, we will find, I submit, that all that he means is that the deed is not to be given such an effect as to defeat the distribution of the assets of the debtor in accordance with the provisions of the bankruptcy act. He speaks of the assignment being "voidable only in case bankruptcy proceedings should be begun" and he then says (190 U. S. at p. 537, 47 L. Ed. at p. 1170):

> "It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in Bartlett *v.* Bramhall, 3 Gray 257, 260, that when they were instituted they not only avoided the assignment, but made it illegal by relation back to its date when, if they had not been started, it would have remained perfectly good."

Further along in his opinion he speaks of the avoidance of the assignment relating back to the date of the deed "so far as his (the assignee's) services or services procured by him tend to the preservation or benefit of the estate" as a "mere fiction." The reporter preparing the headnotes for the case rather accurately indicated the effect of the opinion. The first headnote is (p. 1165):

> "A general deed of assignment is so far avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment as to defeat the right of any claim against the bankrupt's estate to the preference given by such deed."

If the assignment is void in the broad sense of the word "void," then it would appear that any act performed by the assignee under it, such as a transfer of property to a *bona fide* purchaser for value, would be of no effect for, the deed being void, as of its date, any act performed under it would be likewise void. Certainly, no such situation as this should be created as the result of a "mere fiction."

The true rule is that the assignment cannot be given such an effect as to prevent a receiver or trustee in bankruptcy taking over the assets for distribution in accordance with the provisions of the bankruptcy act.

There is a logical distinction in principle between the bankrupt being divested of title by virtue of a general assignment in favor of creditors and being divested of title by virtue of proceedings under the New Jersey Corporation Act or under the inherent powers of an equity court. While, as stated by the District Court in *Silberberg* vs. *Ray Chain Stores,* 54 Fed. 2nd 650, the result may be the same in "forcing a distribution of the assets among those who may be entitled to them under the law" different rules may be applied in each case for there are different elements involved, and we must, I submit, keep in mind here, as always in dealing with the subject, that all of the law is judge-made, and that there are no express directions in the bankruptcy act providing for situations such as are involved either under general assignments or under receiverships established prior to the filing of a petition of bankruptcy but within a four months' period and that the "relation back," as stated by Mr. Justice Holmes in the Scruggs case, is but a "mere fiction." That "fiction," being designed to accomplish results which are in accord with sound public policy, when it appears that the "mere

fiction" will not accomplish such a result but will accomplish a result contrary to public policy, will not be indulged in although it might appear upon the face of things that, logically, it should be, and, if necessary, very fine distinctions will be found to justify a court in not indulging in it.

A general assignment for the benefit of creditors is a private act, voluntary on the part of the assignor. Title is placed in the assignee solely for the benefit of the assignor and creditors. A proceeding which results in a receivership under the New Jersey Corporation Act or by virtue of the inherent powers of a court of equity is not the outcome of a private act but of the act of the Court and, from the date of the taking over of the property by the receiver, the property is *in custodia legis*, which fact alone creates a different situation than that presented by the effect produced by a general assignment and the proceeding under the New Jersey Corporation Act is ancillary to the exercise of the power of the State to kill the corporation the proceeding being in the nature of an equitable *quo warranto*. *Gallagher* v. *Asphalt Co.*, 67 N. J. E. 441.

Under the New Jersey Corporation Act the title of the corporation is divested, not by its voluntary act or by the order of the Court, but by the express provisions of the statute (sec. 68, 2 C. S. of N. J., p. 1644), and, after the appointment of a receiver and the passing of title to him, he holds that title as a statutory agent, a separate and distinct entity, not as trustee for the corporation or for the creditors, or for the stockholders but as trustee for all. He is a separate independent ego, holding adversely to the corporation. It is pointed out by Vice Chancellor Church in *Shachat* v. *Standard Auto Supply Co.*, 106 N. J. E. 105, that

the receiver appointed under the statute is an independent entity created by the statute.

The Circuit Court of Appeals for the 3rd Circuit has held that a proceeding under the New Jersey statute in the Federal court also results in title being divested from the corporation and vested in the receiver and that, after the adjudication of insolvency and the appointment of a receiver, the cause ceases to be one *inter partes*. *Nottebaum* v. *Leckie*, 31 Fed. (2d) 556.

The effect of the divestiture of title of the corporation and the investiture of title in the receiver under such circumstances is quite different from the effect of a passing of title from an assignor to an assignee accomplished by a private assignment, and, added to the fact that the receiver does not hold title solely as trustee for the corporation and the creditors, the stockholders also being interested, is the fact that he is the representative of the Court, and, indeed, of the State, and the property, when in his possession, is in *custodia legis*. He not only takes the property of the corporation by force of the corporation act but he takes its franchises and privileges and he is granted the power by the statute to exercise them. There is nothing left to the corporation. While it is not killed until a decree of dissolution, its life is suspended. The receiver is the corporation plus.

It is not hard to find a distinction between the effect of a proceeding, which will invest a receiver with a title of this nature and the effect of a private assignment for the benefit of creditors vesting title in the assignee, as to the application of the bankruptcy act.

Vice Chancellor Stevenson in 1903 pointed out the distinction and its effect upon the application of the bank-

ruptcy act in *Singer* v. *National Bedstead Co.*, 65 N. J. Eq. 290, at page 306, and said:

> "It certainly does not follow that because a transfer of property is made an act of bankruptcy that therefore such property is recoverable by the bankruptcy trustee."

A trustee in bankruptcy takes the title of the bankrupt as of the date of adjudication and by relation back, in some cases, as of the date of the filing of the petition, but he takes only the title of the bankrupt, although he may have certain added rights conferred upon him by the bankruptcy act, to void, in the case of preferences or what-not, acts of the bankrupt, which assume to confer rights of property upon others, performed within four months of the filing of the petition. When he comes to take over the property in the custody of a State or Federal court receiver appointed under the New Jersey Corporation Act he finds that the bankrupt has no title and that the title is in the receiver, not in trust for the bankrupt, but in his own right as an entity and for the Court and holding adversely to the bankrupt. An assignee for the benefit of creditors has been said not to hold adversely to his assignor. But a receiver appointed under the New Jersey statute does hold adversely to the corporation. Moreover, the trustee finds the property already *in custodia legis*.

It cannot be said, under such circumstances, that the proceeding in the State or Federal court of equity, commenced within four months after the filing of the petition in bankruptcy, is void in the broad sense of the word "void".

It is sufficient to accomplish the purposes of the bankruptcy act that the receiver or trustee in bankruptcy shall succeed to the administration of the assets in accordance with the terms of the bankruptcy act. Of course, in the administration of the assets, no preferences created by the State statute, unless recognized by the bankruptcy act, are to be given. The distribution among creditors is to be made in accordance with the terms and provisions of the bankruptcy act. But, inasmuch as the receiver or trustee in bankruptcy finds the property of the corporation *in custodia legis* and in the possession of the State or Federal court receiver, holding adversely to the corporation, to the title of which and only to the title of which the trustee succeeds, he must get that property out of the jurisdiction of the State or Federal court of equity and it cannot be gotten out until such claims as there may be against it, to protect which the receiver holds adversely to the corporation, are satisfied and among those claims are those held by any creditors of the receiver where the debts have been incurred upon the faith of the State or Federal equity court proceedings and claims for compensation of the receivers and counsel. As I have pointed out, there is no jurisdiction which can settle those claims except the State or Federal court in equity.

The same rule should be applied, I submit, even if the receiver holding possession of the property at the time of the filing of the petition is but an equity receiver, for, here again, when the trustee or receiver in bankruptcy attempts to get the property he finds it already *in custodia legis*, and, unless the Court which has it *in custodia legis* is to be permitted to close its connection with the affair and compensate its officers, the integrity of that Court is destroyed.

Moore v. *Scott,* Circuit Court of Appeals for the 9th Circuit (Jan. 25, 1932), 55 Fed. (2nd) 863, was relied upon by the Court in *Silberberg* v. *Ray Chain Stores,* 58 Fed. (2nd) 766, and is in line with the decision below but since the opinion in *Moore* v. *Scott,* the Circuit Court of Appeals for the same Circuit, has decided *Crocker* v. *Kay,* December 5, 1932, 62 Fed. (2nd) 391, in which it held that the District Judge had no jurisdiction in summary proceedings to require the assignee for the benefit of creditors to pay over amounts disbursed *bona fide* subsequent to the debtor's bankruptcy for services rendered prior thereto citing and following *In re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, and the decisions of this court in *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. Ed. 413, and *Galbraith* v. *Vallely* 256 U. S. 46, 41 St. Ct. 415, 65 L. Ed. 823, and distinguishing the decision of this court in *May* v. *Henderson,* 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. It did not mention its prior decision in *Moore* v. *Scott,* nor did it mention the decision of the Circuit Court of Appeals for the Sixth Circuit in *re Diamond's Estate,* 259 Fed. 70, upon which it relied in *Moore* v. *Scott,* notwithstanding the fact that the Circuit Court of Appeals in *re Jack Stolkin, Inc.,* 42 Fed. (2nd) 829, declined to follow in *re Diamond's Estate.* I submit that the decisions of the 9th Circuit Court of Appeals in *Moore* v. *Scott* and in *Crocker* v. *Kay* are, upon reason, inconsistent.

Following *In re Watts* and sustaining the power of the State Court to proceed to settle the accounts of, and make allowances to, its receivers is *In re Friedman Bros. Tailors, Inc.* (District Ct., Minn.), 19 Fed. (2nd) 243, at page 246,

At the time of the grant to Congress of the power to pass uniform laws with respect to bankruptcy throughout

the United States, it was well recognized that all Courts having jurisdiction to take over the possession of property, *ex necessitate,* had the right to compensate their officers who might be entrusted with the control of that property and to provide for the payment of debts created upon the faith of their orders. The theory of the constitution is that the judiciary of the United States and that of the states should be separate and independent, with one controlling power over the Courts of the States, when it comes to the matter of Federal Constitution and law, to wit, this Court. It was not considered that the lower Federal courts should come in conflict with, or exercise a supervisory control over, or be entitled, by direct action, to interfere with, the State courts. Can it be assumed that, by the grant of power to Congress to pass uniform laws with respect to bankruptcy, it was intended to vest in Congress the power to authorize the lower Federal courts to perform such acts as would prevent State courts taking control of property for any purpose whatsoever, for, if the State courts are to be prevented from compensating their officers and providing for the payment of debts incurred upon their orders after they have possession of the property, if within four months a petition in bankruptcy is filed, any State court which had any regard for its own dignity, would decline, in any case, to ever take possession of property (see the remarks of Vice-Chancellor Stevenson in *Singer* vs. *National Bedstead Co.,* 65 N. J. Eq. 290, at p. 308), but we need not be concerned with the extent of the power of Congress under the constitutional grant, for I submit that it is clear that Congress never intended by the bankruptcy act that State courts or Federal courts of equity, which had obtained possession of property, at times when there was no question as to the

jurisdiction of the Courts should, merely by the fact of the filing of a petition in bankruptcy, be forthwith divested of all power over the property so that they could not compensate their officers and provide for the payment of the debts created upon the faith of their orders and their possession of the *res*. There are no express provisions in the bankruptcy act announcing any such intent. There is an absence of any express provisions in the bankruptcy act which would take care of a situation which would be presented if the bankruptcy act is to be given the construction put upon it by the Courts below.

Congress cannot be charged with having been ignorant of the effect of any such rule as has been announced by the Courts below. It was foreseen by Judge Sanford in the Dayton Coal and Iron Co. case, 291 Fed. 390, which was decided in August, 1922, six months before he became a Justice of this Court. The effect is so disastrous as that it would seem to be apparent that, had Congress intended it, it would have said so in no uncertain language and would have provided what the Bankruptcy Court should do in the matter of compensating State and Federal equity court receivers and in providing for the payment of the indebtedness of such receivers. The act meticulously provides for all other matters with respect to compensation, power of receivers and trustees to incur debts, power to provide for the payment of such debts and the like. But as to this most important matter it is silent. It is only silent, I submit, because Congress did not conceive that any such construction should be put upon the statute as the Courts below have put upon it.

In the case at bar the bankruptcy receiver permitted the receivers of the State Court to proceed to operate the

business of the defendant corporation, sell and purchase merchandise and incur obligations and involve themselves.

It is impossible to determine how much of the moneys in the hands of the receivers in Chancery was derived from the sale of inventory which came to their possession at the time of their appointment and how much was derived from the sale of merchandise which they purchased. Certainly the trustee in bankruptcy is not entitled to the proceeds of the sale of merchandise which the receivers of the State Court purchased, those receivers being an entity, created by the statute of New Jersey, separate and apart from the corporation and holding title for the benefit of the creditors and stockholders of the corporation and adverse to the corporation as such. By the conduct of the receiver in bankruptcy in standing aside, it at least placed the receivers in Chancery in no worse position than had they been ancillary receivers.

In *Loeser* v. *Dallas*, 192 Fed. 909, the Circuit Court of Appeals for the 3rd Circuit, speaking by Judge Buffington, said:

> "The amendment of June 25, 1910, to the bankrupt law, providing for ancillary proceedings in bankruptcy, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of things an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise an-

cillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. Kirker *v.* Owing, 98 Fed. 511, 39 C. C. A. 132; Sands *v.* Neely, 88 Fed. 133, 31 C. C. A. 424; *In re* Isaacson, 174 Fed. 406, 98 C. C. A. 614; Ames *v.* U. P. Ry. Co. (C. C.) 60 Fed. 966.

"These recognized principles and practices in ancillary proceedings we must assume Congress had in view in passing the amendment in question. When in such cases the receiver of an ancillary court makes his accounting to his own court, that court meets all requirements of comity to the primary court by affording the latter, through its proper officer, the opportunity to question the correctness of the accounting to the ancillary court. That was done in this case, and the contention that each creditor in the court of primary jurisdiction had to have notice, and, because the ancillary court had in its possession no list or knowledge of who such creditors are, that therefore the ancillary receiver must file his account in the primary court, is a *non sequitur*, based on the assumption that Congress, while authorizing ancillary proceedings, coupled therewith an extra territorial accounting to which no court should subject its own receiver."

The analogy between the Chancery receivers in the case at bar and ancillary receivers is apparent.

Silberberg vs. *Ray Chain Stores*, 54 Fed. (2d) 650, 58 Fed. (2d) 766, is not applicable as to its facts to the case at bar. In that case ancillary receivers in bankruptcy had been appointed, while in this case no ancillary receiver was

appointed and the Chancery receivers either had to continue to act substantially as ancillary receivers or abandon the property.

In *Loveless* v. *Southern Grocer Co.*, Circuit Court of Appeals for the 5th Circuit, 159 Fed. 415, the Court held:

> "If the order to pay the money into court stands, the summary proceeding against the trustee can be made the basis of proceedings for contempt if he fails to obey the order. It seems to us just and right that he should have an opportunity to present his accounts to a court and to have his claim for credits for payments made by him while receiver in the state court passed on. He should not be required to pay the money into court by a summary proceeding that deprives him of the right to a hearing on the disputed items of his account.
>
> "It is true that the bankruptcy proceedings operated to suspend the further administration of the insolvent corporation's estate in the state court; 'but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way.' *In re* Watts and Sachs, 190 U. S. 1, 35, 23 Sup. Ct. 718, 47 L. Ed. 933."

In *In re Conservative Mortgage and Guaranty Company,* Circuit Court of Appeals for the 6th Circuit, 24 Fed. Rep. (2nd) 38, the Court said, at page 40:

> "The rules applicable to the facts of this case are that the bankruptcy court, by virtue of the adjudication, had paramount and exclusive jurisdiction over the administration of the bankrupt's property in its actual or constructive possession (Orinoco Co. *v.* Metzel, C. C. A. 6, 230 F. 40, 44); that the bank-

ruptcy court was entitled to and was in constructive possession of the bankrupt's property not adversely held by the state court's receiver (*In re* Diamond's Estate, C. C. A. 6, 259 F. 70, 73 *et seq.*), except so far as a lien had been obtained thereon through the action of the state court; that the execution, levy and bill in aid of execution, filed more than four months before bankruptcy, gave a lien upon the bankrupt's property to the extent of the judgment, interest and costs thereon, and costs of the bill in aid of execution, such lien not being an unlawful preference, and so not affected by the bankruptcy adjudication (*In re* Rohrer, C. C. A. 6, 177 F. 381; *In re* Dayton, etc., Co., 291 F. 390, 401, opinion by Judge (now Mr. Justice) Sanford); that as to the bankrupt's property not needed for such purpose the bankruptcy court is entitled to administer it, except so far as it may have been, at the time bankruptcy intervened, in the custody of the state court through its receiver for the purpose of lawful administration and disposition in the proceedings in aid of execution—in which case the state court could lawfully complete its administration under the rule that the jurisdiction first lawfully acquired will not be disturbed by the bankruptcy (*In re* Rohrer, *supra;* Metcalf *v.* Barber, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122; Pickens *v.* Roy, 187 U. S. 177, 23 S. Ct. 78, 47 L. Ed. 128). Except as above stated, the four-months rule cuts no figure here. The bankrupt has otherwise an absolute right to the benefit of the Bankruptcy Act (11 U. S. C. A.). *In re* Yaryan Naval Stores Co. (C. C. A. 6), 214 F. 563, 565, 566."

To the same effect as *Loeser* v. *Dallas,* 192 Fed. 909, is *Park Lane Dresses* v. *Houghton & Dutton Co.,* 54 Fed. (2nd) 33 (C. C. A., 1st), in which the Court said:

> "While the jurisdiction of the bankruptcy court is ordinarily exclusive, where, under circumstances such as exist here, receivers have conducted a going business under a decree of court for nearly a year, hired and paid employees, bought and sold merchandise, and conducted the affairs of the debtor up to the point of disposing of its assets and distributing the proceeds, and the transfer to the court of bankruptcy would by reason of the extra expense entailed materially lessen the estate, the bankruptcy court may, in the exercise of a wise discretion, permit the state court to finish the work it has begun. *In re* Morosco Holding Co. (D. C.), 296 F. 516, 522; Bank of Dillon *v.* Murchison *et al.* (C. C. A.), 213 F. 147."

It has been held that a court of bankruptcy will not appoint a receiver where, at the time of the filing of the petition in bankruptcy, the assets of the bankrupt are in the hands of an assignee or State Court receiver.

In re Oakland Lumber Co., 174 Fed. 634 (C. C. A. 2); *In re Spalding* (C. C. A. 2), quoted in the Oakland Lumber case; *In re Walsh, Inc.*, 295 Fed. 504 (C. C. A. 2d), and *In re Moore*, D. C., N. D., Ga., 42 Fed. 2d 475, at page 478, recognize the duty of the State Court after the filing of a petition in bankruptcy to preserve the property.

But if the decision below is correct, then it is submitted that the bankruptcy court should, in every instance, at once upon the filing of the petition, if there be a State receiver, appoint a receiver, for if it does not, the assets are left in the possession of a State receiver where the jurisdiction of the State Court has ceased, and if there subsequently be an adjudication in bankruptcy all of the acts per-

formed by the receiver of the State Court may be considered as void and of no effect. Such a result, I submit, would be most unfortunate.

Conclusion.

It is respectfully submitted that the orders of the Circuit Court of Appeals and of the District Court in all three cases should be reversed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Petitioners.

Appendix.

New Jersey Statutes Cited.

Sec. 65, N. J. Corporation Act, as amended, Pamphlet Laws of 1931, Chapter 221, page 545:

> "65. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor or stockholder, or stockholders, provided such stockholder or stockholders own at least ten percentum of the capital stock of such corporation, may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from col-

lecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order."

Sec. 66, N. J. Corporation Act, 2 C. S. of N. J., page 1643:

"66. Receiver; appointment; powers and duties. —The court of chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just set offs in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or

trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act (P. L. 1896, p. 298)."

Sec. 68, N. J. Corporation Act, 2 C. S. of N. J., page 1644:

"68. Receiver; property of corporation vested in.—All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto (P. L. 1896, p. 299)."